WACAP
World Association for Children and Parents

NOV 12 2003

November 3, 2003

U.S. Department of State
CA/OCS/PRI
Adoption Regulations Docket Room
2201 C Street, NW
Washington, DC 20520

RE: Docket number State/AR-01/96

Dear Friends,

Helping children & families ... *ide since 1976*

World Association for Children and Parents (WACAP) extends its thanks and appreciation to Deborah Spivack and Jeannene Smith for their carefully prepared, thorough evaluation of the liability and insurance issues raised by the proposed Hague regulations. See attached e-mail from Reach Out, NJ to JCICS Members List, dated October 22, 2003. WACAP shares their concern regarding the tremendous burden the proposed regulations places on agencies. Although these regulations offer excellent safeguards to ensure the integrity of intercountry adoption, they place an undue (and, in many circumstances, impossible) burden on "Primary Provider" agencies to assume nearly all of the myriad risks inherent in intercountry adoption. Such regulations put agencies, their employees, volunteers, directors and officers, at great risk in the unfortunate event that a child with undiagnosed conditions is placed in a family who cannot cope with the demands of a special needs child. The risk that an adoption will go awry, or that a child will be placed with previously unknown or undiagnosed conditions, is a reality in intercountry adoption. As such, it is a risk that well-informed, well-intentioned adoptive parents willingly accept. Further, the well-drafted accreditation requirements provide more than adequate incentive for agencies to fulfill their obligations under the Convention. The threat of undue exposure for civil liability does nothing to improve adoption practices. Indeed, the threat may well result in good agencies shutting their doors.

WACAP offers the following, additional comments:

The Liability and Risk Allocation Provisions (§96.45(c) and §96.46(c).
While WACAP agrees with the majority of the comments by Ms. Spivack and Ms. Smith, our experience and research causes us to differ on one point — adoption agencies' exposure for compensatory damages in wrongful adoption suits. **The scope of risk adoption agencies face in our litigious society far exceeds the cost of reimbursing**

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adoption fees. The most distinct example of the potential exposure is a case where a child is placed in the home and later is discovered to have a severe physical, mental, or emotional condition which requires extraordinary care. If an agency is found to have not exercised reasonable care in either educating the parents or disclosing risks or in investigating and disclosing the child's medical history, the agency could be held liable for the costs of treatment of the undisclosed condition. Depending on the condition and the age of the child, this cost could run into hundreds of thousands of dollars. This is in addition to claims for emotional distress suffered by the adoptive parents, which are often asserted in these types of cases.

In addition to potential damages in the six and seven figure ranges, the cost to defend such suits can reach six figures if defended through trial. Many of the liability policies available to adoption agencies include costs of defense under the limits of liability. In other words, if an agency has a $1 million limit of liability, and an insurance carrier spends $100,000 in attorneys' fees and costs, only $900,000 remains to settle claims. Depending on the severity of a child's condition, that figure may not be sufficient to cover the costs of caring for the child and the sum awarded the parents for emotional distress.

All agencies, whether big or small, are exposed to lawsuits and potential liability if a child is placed in a home and later discovered to have an undisclosed, undiagnosed, or previously unknown condition. Potential plaintiffs in these types of suits could argue negligence on the part of the agency in the homestudy process (for failure to advise of the risks of intercountry adoption and from the particular region); for failing to conduct a "reasonable" investigation into the child's background and medical status; and for failing to advise of risk factors that rendered a child more susceptible to certain conditions or behaviors. These liability risks, among others, exist under our current system. In most circumstances, however, if the agency acted with reasonable care in educating the adoptive parents, acted reasonably in obtaining and disclosing all available medical information, and acted reasonably in disclosing the known risks of adoption, the wrongful adoption claims are defensible. Indeed, in searching for verdicts and settlements in wrongful adoption claims, we found a number of reported defense verdicts in these circumstances. The Hague regulations effectively take away the "reasonable care" standard for acts and omissions of Supervised Providers. In other words, regardless of the care exercised by the Primary Provider, if a Supervised Agency acts negligently, the Primary Provider assumes full responsibility for those acts. These provisions render the reasonable actions of the Primary Provider irrelevant in this context.

Our evaluation of the exposure agencies face in wrongful adoption claims underscores how devastating the proposed regulations regarding liability and risk allocation are. This assessment provides compelling support for Ms. Spivack's and Ms. Smith's well-articulated concern that the liability provisions may force some agencies out of business. If agencies were only liable to refund adoption fees, that risk may be appropriately placed on the Primary Provider. Unfortunately, under the proposed regulations, a lawsuit could expose an agency to a seven figure verdict for acts or omissions by individuals in foreign countries over whom the agency has little to no practical control.

The Indemnification Provisions, §96.45(d) and §96.46(d).
The drafters may argue that the regulations provide sufficient protection to Primary Providers by permitting indemnification provisions in written agreements with Supervised Providers. *See* §96.45(d) and §96.46(d). As a practical matter, this provision is meaningless as the entities with whom we work in foreign countries do not have the resources (or the insurance coverage) available to fulfill the indemnification obligation. Further, to enforce the indemnification provisions, Primary Providers would have to take legal action against the Supervised Provider in the Supervised Provider's country. Permitting these types of indemnification provisions provides little to no recourse for Primary Providers.

The Availability and Cost of Appropriate Insurance, §96.33(h).
An important component touched on by Ms. Spivack and Ms. Smith, is the availability (or lack thereof) of insurance policies to cover the types of risk inherent in intercountry adoption. WACAP recently went through its insurance renewal process and our experience highlights the insurance crisis that is on the horizon — a crisis that will come to the forefront if the proposed regulations are adopted. WACAP was presented with only two options for Commercial General Liability policies with Professional Liability coverage. We were told that there were only three insurance companies currently writing General Liability policies for international adoption agencies. One of these companies had been our insurer for three years and chose not to renew. One company offered $1 million per occurrence/$1 million aggregate policy with no coverage for physical and sexual abuse claims with yearly premiums of $250,000. The third insurance company offered WACAP a $1 million per occurrence/$2 million aggregate policy, with coverage for physical and sexual abuse claims for approximately $210,000. While the specifics of these policies and the scope of coverage offered vary, our experience highlights that despite our excellent record, reputation and "loss histories" and well drafted waiver provisions in our documents, a lawsuit, regardless of merit, can jeopardize an agency's ability to obtain coverage. If the proposed Hague regulations go into effect with the liability and risk allocation provisions in place, we question whether any insurance carrier will continue to write policies for our community and, if so, at what cost. The following reflects how this regulation will financially impact agencies of all sizes as well as, ultimately, the adoptive family.

Current Yearly Cost of Obtaining New Insurance for One Million Dollars Coverage - Not including coverage for Homestudy agency or Foreign Partner. Annual Premium;	Divided by Number of Adoptive Families Per Year	Cost per Family
$210,000	30	$7000
$210,000	100	$2100
$210,000	300	$700
$210,000	600	$350
$210,000	900	$233

The "No Blanket Waivers" Provision, §96.39(d).

Perhaps the most devastating effect of the Regulations on adoption agencies' abilities to manage their risk, is §96.39(d). An appropriately drafted release and hold harmless agreement serves to protect adoption agencies from liability for the risks inherent in the process — most notably, the risk that children will arrive in their families' homes with undiagnosed or unknown conditions. These agreements place the risk of adoption on the adoptive parents – a concept that has always been present in adoption. There have never been and there can be no "guarantees" in adoption. In the adoption triangle, it is the adoptive parent who has assumed the risk that the child he or she accepts may arrive with unknown conditions that will present a challenge to the family. Further, it is the adoptive parent who assumes the risk that their child's country of origin will place a moratorium on all adoptions. The well-informed, properly educated adoptive parent willingly accepts these risks and appreciates that the benefit of welcoming a child into his or her home far outweighs the risks involved. The proposed regulations change this paradigm relieving adoptive parents of responsibility for assuming the risks which arise from, as Ms. Spivack and Ms. Smith so adeptly state, "the same circumstances that lead to children becoming available for international adoption" in the first instance. Section 96.48 requires that agencies provide the information necessary to educate prospective adoptive parents about the risks they face in intercountry adoption. If parents knowingly and willingly assume those risks, agencies should be permitted to protect themselves if those risks materialize.

WACAP joins in the call for adoption agencies, adoptive parents, and their insurance professionals to weigh in on these critical issues so that the children most at need can continue to be served.

L. Michael Feltman

Chief Executive Officer
World Association for Children and Parents

Following is the E-mail to which WACAP refers above. This e-mail was sent to JCICS membership from Deborah E. Spivack, Esquire, Executive Director, Jeannene Smith, Founder of Reaching Out thru International Adoption on October 22, 2003;

By this memorandum, we are hereby providing our comments to certain risk and liability sections of the Proposed Hague Regulations. The official comment period ends on November 14, 2003. We would ask that you consider our viewpoint as an international adoption agency in seeking certain changes to the proposed regulatory scheme.

1. Introduction

The Proposed Hague Regulations provide some excellent guidance for international adoption agencies to follow to ensure that important policies behind the Hague Adoption Convention are effected. The Hague Convention's stated policy is to protect the children, birth parents and adoptive parents involved in intercountry adoptions and to prevent child-trafficking and other abuses. On many issues, the drafters of the Regulations were on the mark in accomplishing these important goals. However, certain provisions that cover risk and liability issues directly counter certain of the goals of not only the Hague Convention, but of the Regulations themselves. While initially the adoption agencies may pay the price by increased costs or going out of business altogether, ultimately, the children of foreign nations and adoptive parents will suffer from the high costs and responsibilities heaped on the agencies, and there will likely be a chilling effect on international adoption to the benefit of no one.

The following statement in the Regulations goes right to the heart of our concerns:

In deference to the historically important role the formation of networks and the use of small agencies and persons have played in providing services ...the Department has created regulations that allow such relationships among agencies to continue. The Department's goal is to mirror current practices and to provide regulatory flexibility so that the regulations do not negatively affect small agencies and person and other providers

Proposed Regulations, p. 54077. Notwithstanding this important recognition, the drafters propose implementation of a financial framework that endangers the agencies' very existence. Specifically, the financial framework does the following:

(i) Statutorily assigns all risk between adoptive parents and their agencies/service providers to the agency/service providers;

(ii) Channels all liability of adoption service providers throughout the system to a single "primary provider;"

(iii) Ties the agencies' hands from sharing any risk within the system with adoptive parents by prohibiting informed waiver provisions;

(iv) Requiring $1,000,000 per occurrence of insurance coverage; and

(v) Incongruously, imposing non-profit status on most agencies.

With the exception of the requirement for non-profit status, imposition of any of these requirements alone would be an enormous hardship for most agencies. However, taken together, the drafters have imposed an unworkable scheme for agencies to implement.

2. Analysis

(a) Assignment of Risk between Adoptive Parents to Service Providers and Channeling of Such Liability to a Single Primary Provider

By enacting certain liability sections of the Proposed Regulations, the drafters are placing an unmanageable financial burden on the agencies that serve as primary providers. Specifically, the provisions expressly require that agency primary providers retain legal authority and "(1) assume tort, contract, and other civil liability to the prospective adoptive parent(s) for the supervised provider's provision of the contracted services and its compliance with the standards in this subpart F; and (2) maintains a bond, escrow account or liability insurance in an amount sufficient to cover the risks of liability arising from its work with supervised providers..." Proposed Reg. 96.45(b)(8) & (c) and 96.46(b)(9) & (c). These provisions have 2 important implications:

(i) The provisions will channel all liability, in tort, contract or otherwise within each case to a single "primary provider" for the actions of all adoption service providers in the U.S. and abroad in the process (subject to certain limited exceptions); and

(ii) The provisions will assign all risk that is inherent in the international adoption system to the agencies versus the adoptive parent(s), thereby creating a statutory cause of action for the adoptive parents to pursue against their agencies.

The drafters' stated goals were: (i) to "improve supervision," by American agencies over its counterparts in the U.S. and abroad, Preamble, at 54081, and (ii) to give parents "legal recourse against a single entity." Preamble, at 54081. The drafters' proposed solutions present enormous dangers for a number of reasons.

First, it is a known fact within the international adoption industry that agencies have little meaningful control over their foreign counterparts. In addition to obvious language and cultural barriers, many foreign agency contacts do not have access to the money, resources, health care, training, record keeping, or legal services that are in anyway comparable to those that we have in the United States. American agencies cannot reasonably be expected to visit every orphanage, attend every doctors' visit, file every paper for every child eligible for international adoption. If resources were available to

help children in foreign lands to this extent, it is unlikely that there would be such an enormous need for international adoption to help the children of these nations. American agencies' chances of successfully policing their foreign counterparts is extraordinarily difficult to accomplish, and this purpose will not be furthered effectively by imposition of liability on such agencies.

Second, in relation to U.S.-based supervised providers, most of whom do only home study, parent preparation and post-placement services, the Proposed Regulations would cause accredited agencies to avoid using their services altogether. Given a choice between utilizing the services of another accredited provider for these functions and utilizing an unaccredited supervised provider, most accredited agencies would be unwilling to accept the legal responsibility and liability that using supervised providers would entail under the proposed regulatory scheme. If these small agencies and social workers (who collectively place thousands of children) are unable to procure written agreements with accredited agencies, they will surely go out of business. The drafters must recognize that these small providers are a vital link in the international adoption community, and without them, many children and adoptive parents will be lost to one another. And, ironically, these small local service providers are the only ones who can still get their own professional liability insurance coverage without difficulty since they are not involved with placing children and are almost never sued.

Third, channeling of liability to the primary provider to "improve supervision" is duplicative of other provisions in the Hague Regulations and, therefore, unnecessary. The drafters proposed a reasonable and appropriate means of encouraging supervision by expressly requiring agencies to investigate their foreign contacts, and to ensure that supervised providers here and abroad are ethical, meet certain standards, and understand and abide by the principles behind the Hague Convention. See Preamble, at 54084; Proposed Reg. Sec. 96.45(a) & 96.46(a). The Hague Regulations take the further well-justified step to require that American agencies to execute written agreements with their supervised providers in the U.S. and abroad that impose certain predefined requirements and certifications that are consistent with the Convention goals. Proposed Reg. Sec. 96.45(b) & 96.46(b). In short, absent the liability provisions, the Hague Regulations already propose a scheme for reasonable supervision which is as much as American agencies could possibly impose over their U.S.-based and foreign supervised providers - and this scheme does not endanger agencies in the manner they are impacted by the liability provisions.

Fourth, the drafters have placed an enormous financial burden on the agencies that the agencies are in no position to assume. Most agencies are not deep pockets - they are non-profit corporations with inherently limited resources. Non-profit corporations face enough of a challenge in training and promoting responsible behavior of, and protecting themselves from the negligence of, their own employees without asking them to assume responsibility for the "local service providers" in the U.S. as well as for third party independent contractors in foreign lands.

Agencies are in business to promote the charitable purpose of "unit[ing] children living in

terrible conditions in foreign orphanages with parents who want them," Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Language in 'Wrongful Adoption' Cases," Boston Bar Journal, May/June 2000. For this reason, the state and federal government have granted such agencies non-profit status so that they can fulfill their important mission.

If anything, non-profit corporations deserve protection from liability in this already overly litigious society. For this precise reason, some states have enacted statutes that provide non-profits with immunity from liability for its own negligence. For instance, the New Jersey Charitable Immunity statute provides as follows:

No nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes or its trustees, directors, officers, employees... shall ... be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation ... where such person is a beneficiary, to whatever degree, of the works of such nonprofit...

See e.g. N.J. 2A:53A-7. Non-profit immunity statutes codify the public policy that ensures that the dedicated staff of not for-profit corporations can accomplish their charitable purpose free of fear from litigation due to negligence. Forcing non-profit international adoption corporations to expressly assume the liability not only for their own employees but for supervised providers here and in foreign lands over whom agencies have no direct control runs counter to other non-profit policy and law and imposes an unduly heavy burden.

Fifth, the language of Sections 96.45 (c) and 96.46(c), statutorily shifts all risk undertaken by prospective adoptive parents in pursuing foreign adoption to their agencies and creates a statutory cause of action for them. These provisions will invite litigation from adoptive parents against the very agencies that are trying to help them build a family.

The predetermination of this result is expressly stated in the Preamble, which provides the purpose of these provisions is to "give the adoptive parents legal recourse against a single entity..." Preamble V(c)(6). However, why do parents need a statutory right to sue? Parents already have a right to sue and are actively using it! See Wall Street Journal, December 7, 1998, "Are Adoption Agencies Liable for Not Telling All?" In fact, these regulations will further promote litigation and, thereby, pit agencies against other agencies and agencies against client adoptive parents. This blame-oriented framework will ultimately destroy the mutual trust the agency community works so hard to build.

Those who advocate for recourse through litigation may suggest that the liability provisions are necessary to punish the agency so that they will seek to ensure that the event that led to a disappointing result for the adoptive parents will not reoccur. However, agencies cannot practicably control the world events, orphanage conditions, available medical equipment, unknown genetic predispositions, or any of the other risks

that lead to the disappointing result in the first place. Using liability as a hammer to force agencies to improve these types of events will be excessive and ineffective.

Moreover, the drafters have already - appropriately - proposed a scheme that will ensure that agencies maintain equitable standards, ensure they work with third parties who maintain ethical standards, and be punished in the event they fail to comply with Hague standards. See Hague Regulations Subpart J. Specifically, the Proposed Regulations already contain a system that permits adoptive parents to file complaints against agencies, that ensures their timely investigation, and that permits imposition of adverse actions or other sanctions. In short, the drafters do not need to layer the liability provisions on top of this solid framework to provide for agency accountability.

Those who advocate for recourse through liability may further suggest that the liability provisions compensate the parents for economic losses resulting from the acts of the foreign coordinators. However, why should the agencies be forced to accept fiscal responsibility for all participants throughout the entire system? The agencies are serving the greater good of carrying out their charitable mission for the children of the world. If the drafters wish for parents to have a means of compensation in the event of a tragic result, there are more reasonable alternatives that can be implemented on their behalves. See Section 3, below.

Further, giving adoptive parents carte blanche to sue their adoption agencies would not only expose the agencies to enormous financial risk, but it would increase the agencies' legal and insurance costs tremendously! These tremendous costs, would, in turn, be passed on to the adoptive parents. Of course, the increased cost of higher insurance premiums presumes that we are able to acquire such a policy in the first place. Our insurance broker has advised us specifically that no carrier with which his agency works would insure for the acts of foreign independent contractors.

Finally, the flaws discussed above are not remedied by the drafters' permitting the agencies to retain the right to seek indemnification against their providers. See Proposed Regulation 96.45(d) and 96.46(d). The agencies will be long out of business before they could ever make use of these tools.

(b) Prohibition Against Contractual Waivers

In addition to statutorily assigning all risk to agencies that normally is shared with parents, the drafters further prohibit reallocation of this risk by contract. Specifically, the Regulations state "the agency or person [may] not require a client or prospective client to sign a blanket waiver of liability in connection with the provision of adoption services in Convention cases." Section 96.39(d).

It is currently standard practice for agencies to advise their clients that international adoption is not a risk-free means of growing their families. Agencies advise the adoptive parents at the outset of the process that they will be working in a foreign country, with a foreign government, foreign language, foreign culture, foreign medical systems and will

be subject to the unknowns of foreign law and custom. We all run the risk of countries spontaneously deciding to close their adoption programs. Moreover, agencies cite the universal risk of developmental delays in orphanage children and the possibility of unknown or undiagnosed medical and psychological conditions of the children due to factors beyond their control. After acknowledging the possible hurdles and roadblocks, many prospective adoptive parents choose to proceed despite the known obstacles. And agencies reasonably ask parents to forego suing the agency if any of the risks becomes a reality.

Once again, the drafters have altered current practice substantially, and prohibited adoption agencies from protecting themselves in this abundantly reasonable manner. Simply stated, to be able to survive as a business, agencies must be able to share the risk and to protect themselves contractually from the threat of litigation by adoptive parent(s). Why should agencies be prohibited from educating their clients about the inherent risks and asking them to decide whether they wish to proceed. As stated in an article on this topic:

In a litigious society such as ours, the ability of an agency to educate prospective parents about the risks of international adoption and then to ask them to accept those risk is indispensable to an agency's ability to carry out its charitable purpose...Put simply, the risks are multiple and known; and absent an ability to require prospective adoptive parents to a voluntarily accept the known risks, agencies may be precluded from their critical mission of finding homes for children.

Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Language in Wrongful Adoption Cases," Boston Bar Journal May/June 2000.

Imposition of a statutory prohibition such as that proposed in the Regulations is inappropriate interference with well-justified business practice. This principle has been recognized by various courts who have determined that exculpatory provisions in this precise context are appropriate and consistent with public policy. See Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Langue in 'Wrongful Adoption' Cases," Boston Bar Journal, May/June 2000 (citing Forbes v. The Alliance for Children, Inc., et al, Suffolk County, Civil Action No. 97-04869B; Regensburger v. China Adoption Consultant ltd., 138 F.3d 1201 (7th Cir. 1999); French v. World Child, Inc., 977 F. Supp. 56 (D.D.C. 1997), aff'd, No. 97-7167 (D. D.C. Cir. Sept. 10, 1998)).

(c) Insurance Requirements

The Regulations further propose a prohibitively high amount of insurance coverage - $1 million per occurrence. Proposed Reg. Sec. 96.33(h). This is inappropriate for several reasons. First, it is already impossible for many agencies to procure professional liability coverage. Our agency has been seeking to renew or purchase a policy for several weeks and we have been met with denials notwithstanding our excellent service record and broad charitable immunity available in our home state. (See letter from insurance broker attached hereto).

Second, the level of $1 million is extraordinarily high given the type of compensatory damages most parents could seek. Adoption expenses will rarely rise above $30,000, and much of these expenses are now setoff against government tax credits and employer contribution benefits. Adoption agencies are not performing surgery. This high floor is unnecessary.

Third, we reiterate our comment that the drafters are inviting litigation from adoptive parents who otherwise would not have such a large policy to pursue. The proposed liability statute, coupled with the high level of insurance coverage, will open the floodgates to litigation by parents seeking to pursue a deep pocket due to their disappointing experience. Wrongful adoption suits based on the Hague Regulations could become the next automobile personal injury for the legal community, which could mire agencies in a future of unlimited and groundless lawsuits.

(d) Additional Comments

We appreciate the encouragement of the Department of State to provide the agency point of view on these issues. The sections of the Regulations discussed herein strongly suggest to us that the drafters of certain of the Proposed Regulations have served as the sounding board for advocates of certain adoptive parents who were "victimized" by unethical international adoption agencies. Like every industry, the international adoption agencies have their bad apples and war stories. We all recognize them and are ashamed when our colleagues give into greed or dishonesty when dealing with vulnerable adoptive parents.

We would, however, respectfully ask the Department of State to also factor into its assessment the real world circumstances the agencies are being asked to police. Indeed, the same circumstances that lead to children becoming available for international adoption create the inherent risk in the process, such as birthmothers abandoning children due to extreme poverty, lack of adequate care and/or ability to receive and provide care for a child - usually with some degree of substandard both pre and post natal care/nutrition, possible undiagnosed genetic conditions, etc. The term "abandonment" alone dictates that often very little information may be known about a child's medical history or genetic disposition. Orphanage workers are usually not skilled, trained medical professionals, but often volunteers or low-paid labor providing basic care only. Orphanages staff spend their time and resources in meeting the basic life-sustaining needs of the children and are usually ill-equipped to focus on extensive and accurate medical evaluations and diagnosis. In many instances, adequate testing to determine true levels of physical, development and/or emotional delays is not readily available in third world countries, too cost-prohibitive for underfunded orphanages, or is viewed as an unnecessary expense to waste on the country's unwanted children. These are the real world circumstances that agencies and adoptive families face everyday and why agencies rely upon informed waiver provisions as an appropriate means to move forward in accomplishing their missions.

We would further respectfully ask that the Department of State to consider the precarious position of agencies in relation to the adoptive parents. The adoptive parents may come to the process influenced negatively by other factors that have nothing to do with their agency. As one author stated:

Passions run high in these [wrongful adoption] cases. Often, they... involve parents whose emotions were already rubbed raw by not being able to have their own children. Many then faced a legal obstacle course to adopt. Gradually realizing that their long-awaited child has physical or mental problems can be the last straw, emotionally. What's more, to prove their case [against their agency], parents must often argue that they would not have adopted the children if they had known the truth.

Wall Street Journal, December 7, 1998, "Are Adoption Agencies Liable for Not Telling All?" cited in Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Langue in 'Wrongful Adoption' Cases," Boston Bar Journal, May/June 2000. Arming emotionally-charged parents with a target for their blame and despair will only fuel the litigation crisis further and lead to a counter-productive result.

The international adoption agency community would like the Department of State to recognize that the vast majority of us are in this industry for the right reasons - to bring together children living as orphans in dangerous conditions in foreign lands with able parents who want to nurture them. And we are proud to report that that the success stories far outweigh the tragedies. In fact, considering that international adoption has brought almost 160,000 children to the United States for adoption from foreign countries since 1989, the tragedies are remarkably few. See State Department Website, http://travel.state.gov/orphan_numbers.html.

We believe that the proposed liability structure of the Hague Regulations will throw the baby out with the bathwater and go far beyond, and run counter to, the purpose of the Hague Convention. It will not only prevent the tragedies but it will destroy the ability of Americans who seek to grow their families through adoption to do so because they can't afford the cost of the few agencies that were able to stay in business. And, of course, imposition of these impossible standards will have a tragic effect on the very children who the agencies, and the drafters of the Hague legislation, seek to help.

3. Proposed Alternative Solutions

The Hague Regulations can accomplish the purpose of the Hague Convention, and even some of the new purposes that apparently were added when drafting the Hague Regulations, by striking the following provisions:

(i) Strike sections 96.45(b)(8) & (c) and 96.46(b)(9) & (c) - These are the key provisions which assign all risk between adoptive parents and their service providers to the service providers, and channel that liability to the primary providers;

(ii) Strike section 96.39(d), which ties the agencies hands from sharing any risk within

the process with adoptive parents by prohibiting informed waiver provisions. Waiver provisions should be permissible if the agencies educate their clients about known risks and parents knowingly decide to undertake such risk; and

(iii) Strike section 96.33(h) - Requiring $1,000,000 per occurrence of insurance coverage. Insurance should not be a requirement unless the Department of State can propose a reasonable amount of coverage that is reasonably related to compensatory damages and will not encourage litigation, and until the Department of State can guaranty the availability and affordability of such policies.

As stated previously, the justifications for these provisions are accomplished effectively and appropriately by other provisions in the Regulations. The requirements of sections 96.45 and 96.46 (without sections 96.45(b)(8) and (c) and 96.46(b)(9) and (c)) accomplish effectively the drafters' desire to gain control and supervision over supervised providers here and abroad. The provisions are bolstered by Subsection J, which demands that all agencies conduct themselves with the highest of standards or risk losing their reputations or, worse, their licenses and/or accreditation.

The requirement for insurance coverage and prohibition against waivers forces the agencies to accept substantial risk that could effectively be spread throughout others in the process. Parents should be able to make a knowing decision that they can or cannot afford to accept known risks. Agencies should be able to pursue their charitable purposes without the threat of constant litigation.

As alternatives to retain some of the protections that the drafters proposed by the stricken provisions, we propose that the drafters ask the insurance industry to analyze underwriting international adoption insurance policies for parents to individually defray the known risks of international adoption. Insurers cover domestic adoption risks, as well as travel insurance risks. It is not a far stretch for insurance companies to cover the risks associated with foreign adoption and not unreasonable to ask that the parents pay insurance premiums if they want the added protection from financial loss in the event of a disappointing result.

Finally, to the extent that the drafters wish to create some scheme that would allow financial compensation in the event of a tragic result, we believe that the agencies, under the administration of the State Department or some other governing body, might develop and implement a claims mechanism similar to what is used by other professionals in other industries. For example, many state bar associations have a Lawyers' Fund For Client Protection. Law firms remit annual "dues" and, basically, commit a predefined amount of resources to cover the misdeeds of the dishonest lawyer in the community. Of course, there would need to be a claims process that would require the claimant adoptive parent to demonstrate need, and a governing body to determine if the standards are met. But this may be a compromise with which the industry, the adoptive parents, and the needy children of the world can actually live.

Respectfully submitted,

Reaching Out thru International Adoption

Deborah E. Spivack, Esquire, Executive Director
Jeannene Smith, Founder